Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

J. YOUNG & COMPANY, INC.,

Petitioner,

versus

M/V BOB LIVINGSTON, *et al.*

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May a party who has not sustained physical injury to a proprietary interest nevertheless recover for economic loss? The identical issue was presented for review in *White v. M/V TESTBANK*, 106 S.Ct. 3271 (1986), in which this Honorable Court denied the application for a writ of certiorari.

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SUMMARY OF ARGUMENT

The rule that economic loss cannot be recovered absent physical injury to a proprietary interest is a "pragmatic limitation . . . upon the doctrine of foreseeability," *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1021 (5th Cir. 1985) (*en banc*), *cert. denied sub nom. White v. M/V TESTBANK*, 106 S.Ct. 3271 (1986), and mandates denial of the petition for a writ of certiorari.

ARGUMENT

This Honorable court recently was confronted with the identical issue presented by the case at hand in *White v. M/V TESTBANK*, 106 S.Ct. 3217 (1986). Petitioners' application for a writ of certiorari in that case was denied.

Here, cognizant of the limitations which logically must be imposed upon the concepts of foreseeability and proximate cause, the District Court and the Court of Appeals in the instant case denied petitioner's claim for economic loss because 1) petitioner lacked a proprietary interest in the wharf at issue, and 2) that wharf sustained no physical damage. *J. Young & Co., Inc. v. M/V BOB LIVINGSTON*, No. 85-3310 (5th Cir. Feb. 27, 1986). Thus, under the rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) and *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*), *cert. denied sub nom. White v. M/V TESTBANK*, 106 S.Ct. 3217 (1986), prohibiting recovery for economic loss in cases in which no physical injury to a proprietary interest has been sustained, petitioner's claim failed to satisfy both requirements of the prerequisites for recovery—physical damage to a proprietary interest.

Respondents respectfully submit the *Robins/TESTBANK* rule is sound. As stated by the TESTBANK court:

> . . . pragmatic limitations on the doctrine of foreseeability are both desirable and necessary.
>
> * * *
>
> Plaintiffs concede, as do all who attack the requirement of physical damage, that a line would

> need to be drawn —somewhere on the other side, each plaintiff would say in turn, of its recovery.
>
> * * *
>
> Plaintiffs point to seemingly perverse results, where claims the rule allows and those it disallows are juxtaposed—such as vessels striking a dock, causing minor but recoverable damage, then lurching athwart a channel causing great but unrecoverable economic loss. The answer is that when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, such differing results are the inevitable result—indeed, decisions are the desired product.

TESTBANK, 752 F.2d at 1027, 1028, 1029.

Thus, far from disregarding the concepts of foreseeability and proximate cause, the District Court and the Court of Appeals dismissed petitioner's claim on the basis of the *Robins/TESTBANK* rule which itself is specifically grounded on the premise that without a bright line rule or pragmatic restriction, the concepts of foreseeability and proximate cause ultimately fail to function as rules of law. Accordingly, the *Robins/TESTBANK* holding, as applied to the facts of this case, must stand. Respondents therefore urge this Court to deny the petition for a writ of certiorari.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted:

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